Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1723

ARISTOCRATIC RESTAURANT
OF MASSACHUSETTS, INC.,
APPELLANT,
v.
ALCOHOLIC BEVERAGES CONTROL COMMISSION
(No. 1),
APPELLEE.

ARISTOCRATIC RESTAURANT
OF MASSACHUSETTS, INC.,
APPELLANT,
v.
ALCOHOLIC BEVERAGES CONTROL COMMISSION
(No. 2),
APPELLEE.

~~ON APPEAL FROM THE SUPERIOR COURT OF~~ MASSACHUSETTS. Sup Jud Ct

Jurisdictional Statement.

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BATEMAN & SLADE, INC. BOSTON, MA.

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No. .

ARISTOCRATIC RESTAURANT
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(No. 2),
APPELLEE.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

Jurisdictional Statement.

Appellant appeals from judgments of the Superior Court of Massachusetts after rescripts entered April 6, 1978, in accordance with the rescripts and opinions of the Supreme Judicial Court of Massachusetts entered March 3, 1978 (one Justice dissenting), affirming judgments of the Superior Court entered May 2, 1977. The judgments dismissed

without costs the complaints of the Appellant which had sought judicial review of decisions of the Massachusetts Alcoholic Beverages Control Commission (hereinafter ABCC) suspending all licenses issued to the Appellant. Appellant submits this statement in both cases pursuant to Rule 15(3) to show that the Supreme Court of the United States has jurisdiction of the appeal and that closely related substantial questions are presented.

Opinions Below.

The judgments of the Superior Court are unreported, and appear in Appendices A-1 and A-2 hereto. The opinions of the Supreme Judicial Court of Massachusetts and of the dissenting Justice are reported in Mass. Adv. Sh. (1978) 558, ____ N.E. 2d ____, and Mass. Adv. Sh. (1978) 584, ____ N.E. 2d ____.* Copies of these opinions appear as Appendices B-1 and B-2.

Jurisdiction.

These cases were brought in the Superior Court of Massachusetts under Massachusetts General Laws c. 30A for judicial review of agency decisions of the ABCC. The Massachusetts Superior Court granted motions for summary judgment filed by the ABCC and entered judgments dismissing the complaints without costs. The Appellant

* The cases appealed are referred to herein as *Aristocratic No. 1* and *Aristocratic No. 2*.

appealed the judgments to the Appeals Court, an intermediate appellate court. The Supreme Judicial Court, *sua sponte*, ordered direct appellate review and entered its rescripts and opinions on March 3, 1978. In accordance with these rescripts, the Superior Court judgments were affirmed. The jurisdiction of the United States Supreme Court to review the decisions on appeal is conferred by Title 28, United States Code, § 1257(2). The following cases sustain the jurisdiction of the Supreme Court to entertain these appeals: *Lathrop* v. *Donohue*, 367 U.S. 820, 824-825 (1961), reh. denied, 368 U.S. 871 (1961); *Williams* v. *Bruffy*, 96 U.S. 176, 183 (1877); *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283 (1932).

The appeals are timely, notices of appeal having been filed in the Superior Court on May 30, 1978. Copies of the notices of appeal are appended hereto as Appendices C-1, C-2, C-3 and C-4.

Statutes Involved.

Licensing Board for the City of Boston (hereinafter BLB) "Condition Thirteenth" (hereinafter Regulation 13), a regulation of a state agency of Massachusetts appearing on the face of the license issued by the BLB:

> "Thirteenth. Entertainment, if any, must be confined to a particular place, and the entertainers must not be allowed to mingle with or circulate among the patrons."

Alcoholic Beverages Control Commission Regulation 21 appearing in the Regulations of the ABCC filed with the Secretary of the Commonwealth of Massachusetts:

> "21. No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefor, whether present or not."

Massachusetts General Laws c. 272, § 26:

> "Whoever, for the purpose of immoral solicitation or immoral bargaining, shall resort to any cafe, restaurant, tavern, as defined in section one of chapter one hundred and thirty-eight, or other place where food or drink is sold or served to be consumed upon the premises, and whoever shall resort to any such place for the purpose of, in any manner, inducing another person to engage in immoral conduct, and whoever, being in or about any such place, shall engage in any such acts, and any person owning, managing or controlling such place and any employee of such person who induces or knowingly suffers any person to resort to, or be in such place for the purpose of immoral solicitation or immoral bargaining, shall be punished by a fine of not less than twenty-five nor more than five hundred dollars or by imprisonment for not more than one year, or both."

Questions Presented.

The following questions are presented by this appeal:

1. Whether Regulation 13 of the Licensing Board for the City of Boston providing that "entertainers must not be allowed to mingle with or circulate among the patrons" is unconstitutional as vague, overbroad, and violative of rights of persons to freedoms of association, expression and privacy, and so offensive to the First and Fourteenth Amendments to the United States Constitution.

2. Whether Regulation 21 of the Alcoholic Beverages Control Commission providing that a licensee shall not "permit any . . . illegality of any kind to take place in or on the licensed premises" and making the licensee responsible therefor "whether present or not" is unconstitutional as overbroad and depriving a person of property without due process of law, and so offensive to the Fourteenth Amendment.

3. Whether Mass. G.L. c. 272, § 26, making it a misdemeanor for "any person owning, managing or controlling" a licensed premises to "induce or knowingly suffer" any person to resort to or be in such place "for the purpose of immoral solicitation or immoral bargaining" is so vague and overbroad as not to provide a constitutional basis for a violation of a regulation prohibiting an "illegality" on such premises.

Statement.

In *Aristocratic No. 1*, the ABCC is seeking to suspend the Appellant's alcoholic beverage license upon claimed viola-

tions of ABCC Regulation 21 and BLB Regulation 13. ABCC Regulation 21 provides as follows:

> "21. No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefor, whether present or not."

BLB Regulation 13 provides as follows:

> "Thirteenth. Entertainment, if any, must be confined to a particular place, and the entertainers must not be allowed to mingle with or circulate among the patrons."

The Appellant contends that the portions of Regulations 21 ("[n]o licensee . . . shall permit any . . . illegality of any kind to take place") and 13 ("entertainers must not be allowed to mingle with or circulate among the patrons") upon which the ABCC relies are unconstitutional, vague and overbroad on their face.

The conduct by employees of the Appellant which gave rise to the suspension took place on October 25, 1975, at 9:45 P.M., when two investigators of the ABCC, seated at a bar in the Appellant's premises, were approached by two entertainers who had completed their dancing on stage. The investigators were asked by the entertainers if they would buy the entertainers a drink. The investigators each refused and the entertainers left.

A regulation of the ABCC and a regulation or condition of a license issued by the BLB must be construed in accordance with the same standards as to constitutionality as a statute, for they have the force of law and may be the basis for the revocation or suspension of valuable licenses. Mass. G.L. c. 138, § 23. When such interests are affected, the constitutional questions raised by these regulations may be litigated. *See Boston Licensing Board* v. *Alcoholic Beverages Control Commission*, 367 Mass. 788, 328 N.E. 2d 848 (1975).

Neither the phrase "permit any illegality" in ABCC Regulation 21 nor the concept of entertainers "mingling with" or "circulating among" the patrons in BLB Regulation 13 is sufficiently defined or clear in the regulation to be constitutionally enforceable. In questions of this type "[p]recision of regulation must be the touchstone." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438 (1963). Statutes and regulations, to survive constitutional muster, must be found to have been drawn with the "requisite narrow specificity" which will protect an individual's constitutional rights, particularly First Amendment rights. *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965).

The concept of an "illegality" without definition in ABCC Regulation 21 affords a licensee no notice as to what particular conduct may result in an alleged violation. A licensee is required to guess at the meaning of the word — and the word will encompass different actions to different enforcement officials at different times. To require a lay individual or corporate licensee to speculate, under peril of loss of livelihood, as to the meaning of such a term is to eliminate all meaningful right not to be deprived of a license entitlement without due process of law. Any statute, rule or regulation which simply prohibits an "illegality" is "void, on its face, as contrary to the Fourteenth Amendment." *Winters* v. *New York*, 333 U.S. 507, 509 (1948).

The unconstitutional overbreadth of the regulation is emphasized by the *diktat*, all too characteristic of liquor board regulations of the post-Prohibition Repeal era in the United States, that "the licensee shall be responsible therefor, whether present or not." Such an effort to eliminate even the semblance of *scienter* presents a substantial federal question and should not be countenanced by this Court.

The prohibition on "mingling" or "circulating" in BLB Regulation 13 is similarly void for vagueness, and also for overbreadth. The meaning of the verb "mingle" is not apparent, particularly in the context of a prohibition upon the speech and conduct of entertainers in a liquor-licensed premises.

The American Heritage Dictionary defines "mingle" as "To become closely associated; join or take part with others." *The Oxford English Dictionary* specifies more precisely that mingling involves, as to persons, association "with or among others" (emphasis supplied) and denotes mingling with another person in conversation or friendship as obsolete. It adds a definition of association "in some action or combination."

Even the leading case for the power of liquor regulatory agencies to adopt and enforce regulations, *California* v. *LaRue*, 409 U.S. 109 (1972), acknowledges that the Twenty-First Amendment does *not* "supersede all other provisions of the United States Constitution in the area of liquor regulations." 409 U.S. at 115.

The majority opinion of the Supreme Judicial Court found that Regulations 13 and 21 were "not unconstitutionally vague as applied to the [Appellant] in the circumstances revealed by the [ABCC] findings." Mass. Adv. Sh. (1978) 558, at 563. The court continued:

> "The [Appellant], therefore, [has] no standing to challenge these regulations on due process grounds by showing that the regulations may be facially vague, that is, impermissibly vague in other factual circumstances." Mass. Adv. Sh. (1978) 558, at 563.

The dissenting Justice agreed with that conclusion of the court but found that Regulation 13 did impose "a real and substantial deterrent to the exercise of rights" of free expression and assembly as set forth in the Constitution of the Commonwealth of Massachusetts and would hold that the court "cannot ensure the protection of those rights by interpreting the regulation so as to limit its application to unprotected activity. Under this view, the [Appellant] simultaneously satisf[ies] the requirements for establishing standing to assert the overbreadth claim and for succeeding on the merits of that claim." Mass. Adv. Sh. (1978) 558, at 571.

In *Aristocratic No. 2*, the ABCC seeks in addition to employ its Regulation 21 through the use of a Massachusetts statute, Mass. G.L. c. 272, § 26. The facts in that case include, in addition to mingling, allegations of physical contact between the ABCC investigator and the employee. The Appellant argues that the statute is vague and overbroad on its face and can therefore not constitute a valid basis for the suspension of liquor licenses even when combined with an overbroad regulation.

The Questions Are Substantial.

I. The Validity of the Regulations at Issue in this Case is Not Governed by the Supreme Court's Decision in California v. LaRue, 409 U.S. 109 (1972).

This Court held in *LaRue* that the Twenty-First Amendment permits the states to regulate certain *sexually* related

activities performed in establishments where liquor is sold, even though some aspects of those performances might in another context be protected expression under the First and Fourteenth Amendments. Because the case is sometimes cited as a justification of any state regulation of individual behavior or business practices in the context of the serving of liquor, it is important to look closely at the actual regulations at issue in that case and to compare them to the one enforced against the Appellant in the instant case.

The California regulations forbade a variety of grossly sexual behavior by entertainers and customers, and were justified by extensive evidence which established that public and offensive, and illegal, sexual contact between entertainers and customers of licensed establishments was a common occurrence. The regulations directly prevented the behavior with which the state was concerned, and there was no other apparent way to control such behavior. The BLB regulation forbidding mingling has none of these characteristics, and *LaRue* therefore is not a governing decision.

A. *The BLB Regulation Prohibits Constitutionally Protected Activity which does Not "Partake . . . of Gross Sexuality."*

In *LaRue*, the regulations prohibited the performance of acts, or simulated acts, of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law"; "the actual or simulated touching, caressing, or fondling on the breast, buttocks, anus or genitals"; "the actual or simulated displaying of the pubic hair, anus, vulva or genitals"; or the displaying of any film or pictures portraying such acts. In

addition, licensees were forbidden to permit "any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus." 409 U.S. at 111, 112.

These regulations, forbidding the actual performance of sexual acts by entertainers and customers, were adopted by the California Department of Alcoholic Beverages Control after numerous instances of sexual activity between customers and entertainers during performances, and other incidents of indecent exposure and public masturbation by customers. The Court characterized the occurrences inside the bars as "bacchanalian revelries," 409 U.S. at 118, and summarized the evidence presented to the Department as follows:

> "Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred." 409 U.S. at 111.

Correctly observing that this conduct might itself violate penal statutes, 409 U.S. at 117, and that the performances "partake more of gross sexuality than of communication," 409 U.S. at 118, the Court upheld these regulations.

By great contrast, the BLB regulation which restrains the exercise of rights to liberty, free speech, and association is of an entirely different nature. Mingling, mixing with, or circulating among patrons is not grossly sexual, or even

sexual at all; and it certainly is not behavior which in and of itself violates valid state penal statutes. It is behavior which is in fact constitutionally protected, consisting as it does of an exercise of any citizen's right to sit with, speak to, or walk among people in a public place. Such a regulation is different in its scope, purpose, and justification from the California regulations upheld in *LaRue*; it is necessary to examine the Boston regulation independently to determine whether it impermissibly limits Appellant's constitutional rights.

B. *The Behavior Sought to be Controlled by the BLB Regulation Could be and Is Regulated by Other Less Drastic Regulations.*

The BLB's mingling regulation constitutes "a blunderbuss attack on constitutionally protected interests . . .." Liacos, J., dissenting in *Aristocratic Restaurant of Massachusetts, Inc.* v. *Alcoholic Beverages Control Commission (No. 1)*, Mass. Adv. Sh. (1978) 558, at 574. The rationale for the regulations is the concern that any proximity or communication between entertainers and customers in a liquor-licensed establishment leads inevitably to substantive evils which the state is empowered to prevent. It is important again to note the difference between this claim and the conclusion in *LaRue*, that prohibition of certain forms of sexually explicit or nude performances could be justified as a means for the prevention of other illegal activity. In Boston, the substantive evils said to be prevented are the solicitation of drinks by entertainers and the solicitation of acts of prostitution. However, both of these activities are in themselves unlawful, or violative of regulations not challenged here. In *Aristocratic No. 1, supra*, the Supreme

Judicial Court upheld the BLB's mingling regulation, but it did so where the evidence actually consisted of entertainers soliciting drinks. The mingling regulation was clearly unnecessary in that case to control the actual objectionable behavior. The Supreme Judicial Court explicitly left open the question whether such a regulation could be justified as a preventative measure. *Aristocratic No. 1, supra*, Mass. Adv. Sh. (1978) 558, at 566, n. 6. The Appellant presents such a question.

II. APPELLANT'S CONSTITUTIONAL RIGHTS TO LIBERTY, FREE SPEECH, AND ASSOCIATION ARE DIRECTLY RESTRICTED BY THE ENFORCEMENT OF THE BOSTON LICENSING BOARD'S REGULATION.

There can be no doubt that the Appellant's entertainers have rights to liberty, to free speech, and to association which are protected by the First and Fourteenth Amendments to the United States Constitution. These rights are granted to all citizens, and while they have their roots in the necessity of preserving rights of political association and expression, *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963), the Constitution does not require that one must be a part of a political movement or be addressing an issue of current political concern in order to be protected from state interference in one's speech or association or state infringement on one's liberty. This Court has described the right of assembly as "the right of the people to gather in public places for *social* or political purposes . . .." (Emphasis added.) *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615 (1971). The state cannot suppress speech or association

merely because of an assumption that such speech will not have a political or socially valuable content.

In *Winters* v. *New York*, 333 U.S. 507 (1948), the Supreme Court expressly held that the right to a free press extended far beyond the communication of overtly political information. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." 333 U.S. at 510. Surely the companion First Amendment rights of free speech and association are entitled to no less protection.

Furthermore, the tactic of creating a prior restraint on speech because of an expectation that such speech will have effects which the state may legitimately control requires an exceptional showing of imminent harm by the state. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Dennis* v. *United States*, 341 U.S. 494 (1951); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

Some restraints on expressive conduct have been justified where the conduct itself creates some danger or is of such a nature that it may constitutionally be proscribed. *United States* v. *O'Brien*, 391 U.S. 367 (1968). However, *O'Brien* set out a strict test for determining whether such conduct could be regulated, two elements of which are that "the governmental interest is unrelated to the suppression of free speech; and . . . the incidental restriction on alleged First Amendment freedoms is no greater than is essential for the furtherance of that interest." 391 U.S. at 377. The BLB's regulation proscribing mingling and circulating impacts

directly upon entertainers' rights to speak to and to associate with patrons of their place of employment. It is hard to conceive of a more effective bar to speech and association than the requirement that entertainers be prevented from mingling and circulating when they are not performing.

These regulations therefore directly and inevitably deprive entertainers of the Appellant of their constitutional rights to free speech, liberty, and association. It is a simple matter to suggest hypothetical situations which further demonstrate the overbreadth of these regulations and the vast number of situations where communication between performers and audiences would be prohibited if these regulations are enforced. The dissenting Justice in *Aristocratic No. 1, supra,* did so, Mass. Adv. Sh. (1978) 558, at 575-576. Further examples abound — thus, the members of the Boston Symphony Orchestra would not be permitted to speak with friends or admirers during intermission at Symphony Hall, and the many folk and jazz musicians and singers performing in licensed establishments who contribute to Boston's deserved reputation as a musical and cultural center would be forbidden from walking through the room between sets or from speaking with whichever friends or strangers they might meet.

Illicit sexual behavior is a legitimate concern of the state and of the BLB, and the Twenty-First Amendment does give the state power to regulate the serving of liquor especially strictly. However, where other constitutionally protected activity is at issue, the Twenty-First Amendment does not supersede the other provisions of the United States Constitution. *California* v. *LaRue*, 409 U.S. 109, 115 (1972).

In the cases at bar, the ABCC has apparently sought to save the enforceability of two unconstitutional regulations

by combining them. Yet the definition of one vague term by others which are vague, overbroad and constitutionally offensive to free association can hardly be deemed satisfactory. Nothing plus nothing is still nothing. Cf. *Reiss* v. *United States*, 324 F. 2d 680 (1st Cir. 1963).

III. Mass. G.L. c. 272, § 26, is Unconstitutionally Vague.

The Appellant asserts that the statutory language of Mass. G.L. c. 272, § 26, is unconstitutionally vague in violation of the Fourteenth Amendment to the United States Constitution. Specifically, the defect of vagueness in the statute derives from the terms "immoral solicitation" and "immoral bargaining," neither of which is adequate to give notice to a person of the conduct which is prohibited by the statute.

That a statute prohibiting certain conduct must satisfy requirements of definiteness as to the conduct prohibited is clear under both the Federal and State Constitutions. *See Bouie* v. *City of Columbia*, 378 U.S. 347 (1964); *Jaquith* v. *Commonwealth*, 331 Mass. 439, 441-442, 120 N.E. 2d 189 (1954). Of course, a statute may be given a definitive construction by a court to save its otherwise ambiguous language. *Commonwealth* v. *Balthazar*, 366 Mass. 298, 300, 318 N.E. 2d 478 (1974). However, Mass. G.L. c. 272, § 26, has not been so construed. In the absence of such a construction, the meaning of the statutory language must be derived by reference to the plain and common meaning of its terms. *Jaquith* v. *Commonwealth*, *supra*, at 442. The Appellant submits that the plain and common meaning of the terms used in c. 272, § 26, is so vague, indefinite and imprecise that the statute does not plainly set out a crime. The word "immoral" is defined as "contrary to established

morality" and "immorally dissolute." *The American Heritage Dictionary* 658 (1973 ed.). The word "moral" has been defined as:

> "3. Being or acting in accordance with standards and precepts of goodness or with established codes of behavior, especially with regard to sexual conduct.
> "4. Arising from conscience or the sense of right and wrong: a moral obligation . . .." *Id.* at 852.

That these dictionary definitions convey the same vague, judgmental and individual notions of morality and immorality contemplated by the statute is clear from the case of *Commonwealth* v. *Cook*, 53 Mass. (12 Met.) 93 (1846), where the Supreme Judicial Court termed the conduct involved there as "grossly immoral acts, and open violations of the divine law." *Id.* at 94. The open violations of the divine law in that case consisted of a man spending 9 days in a hotel in Philadelphia with a 17-year-old woman who voluntarily went there with him; his repeated attempts to convince her to have sexual intercourse with him; his anger as a result of her refusal; and his punishment of her by twice pushing her out of bed and once pinching her arm. *Id.* at 93-94. Whatever criminal liability might attach to such acts today under a narrowly drafted statute, it is clear that the monolithic concept of "the divine law" prevailing in 1846 holds no place in today's open society. *See Commonwealth* v. *Balthazar*, *supra*, at 301-302. Yet no recent limiting construction has been placed upon the statute which would guide persons in their daily lives so as to avoid its proscriptions. If read in a manner consistent with the notions of morality expressed in *Commonwealth* v. *Cook*, this statute clearly gives no warning of what is

prohibited — if for no other reason than the fact that few persons in today's society would believe such acts to be "grossly immoral" or "open violations of the divine law."

In the case of *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), this Court addressed an analogous question and held that the words "welfare," "decency" and "morals" of the community did not provide sufficient guidance to licensing authorities under a municipal scheme which permitted those authorities to permit or restrain the use of the streets for public expression. 394 U.S. at 153. The basis of the Court's decision was that such terms were so vague that the officials were left with unfettered discretion to grant or withhold permits at will. The holding recognizes that one of the objections to vague language is that it provides inadequate guidance to the triers of fact. *See also Bouie* v. *City of Columbia, supra,* at 352-353; *Commonwealth* v. *Horton*, 365 Mass. 164, 310 N.E. 2d 316, *passim* (1974); *Commonwealth* v. *Capri Enterprises, Inc.*, 365 Mass. 179, 310 N.E. 2d 326 (1974).

In *Musser* v. *Utah*, 333 U.S. 95 (1948), the Court considered a state statute which prohibited conduct "injurious to public morals." Even though the parties had not addressed the question of the constitutionality of the statute, the Court held that the question of the constitutionality of the state statute was so serious that it would not render a decision and would require that the matter be returned to the state Supreme Court for its consideration of the question. In the course of its opinion, the Court pointed out that "[i]t is obvious that this is no narrowly drawn statute. . . . Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. . . . This led to the inquiry as

to whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt." 333 U.S. at 96-97.

The failure of Mass. G.L. c. 272, § 26, to provide such guidance to the trier of fact leaves each person or agency administering the statute in the position of applying his or its own notions of morality. Since such notions must necessarily be based upon an individual's own judgment of what is or is not moral, the failure of the statutory language to restrict the exercise of that judgment by the delineation of clear and ascertainable standards renders the statute void for vagueness.

IV. Mass. G.L. c. 272, § 26, is Unconstitutionally Overbroad.

When the literal interpretation of statutory language, not otherwise narrowed by judicial construction, would reach speech or conduct protected by the First Amendment to the United States Constitution, then the statute is overbroad and, therefore, unconstitutional. The defect of overbreadth in a statute generally arises because the statute's language is so vague as to render it susceptible to an interpretation which extends beyond the proper reach of legislative authority. Mass. G.L. c. 272, § 26, falls into this class of statutes because an interpretation of its terms consistent with the guidelines of *Commonwealth* v. *Cook, supra,* would permit prosecution and conviction of an individual for acts and speech protected by the First Amendment.

Chapter 272, § 26, prohibits immoral bargaining or immoral solicitation. Both bargaining and solicitation require or, at least, include conversation. That language

might be considered to be immoral under § 26 but still be protected by the First Amendment is apparent from several decisions of this Court. *See, e.g., Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Cohen* v. *California*, 403 U.S. 15 (1971); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971). Since Mass. G.L. c. 272, § 26, would permit the prosecution of an individual for protected expression, it is overbroad and unconstitutional.

Conclusion.

The Appellant complains, therefore, that Regulation 21 of the ABCC, Regulation 13 of the BLB, and Mass. G.L. c. 272, § 26, sought to be enforced by the sanction of suspension are void for vagueness and overbreadth for they do not define an offense which the licensee may distinguish from constitutionally protected conduct such as speech and association of its employees with its customers. The questions raised by the appeal are substantial and they are of public importance.

Respectfully submitted,

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Appendix A-1.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 11792

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC.,
PLAINTIFF

v.

EDWARD F. HARRINGTON, COMMISSIONERS OF THE ALCOHOLIC BEVERAGES CONTROL COMMISSION OF THE COMM. OF MASS.,
DEFENDANTS.

Judgment for Defendant[s] after Rescript (Pursuant to Mass.R.A.P.28)

This action was appealed to the Supreme Judicial Court; the issues having been duly heard and the Supreme Judicial Court having duly issued a rescript, it is ordered and adjudged:

Complaint of plaintiff is dismissed as to defendants.

Dated at Boston, Massachusetts, this 6th day of April, 1978.

By: JOHN J. LYNCH,
Assistant Clerk.

Appendix A-2.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 8913

ARISTOCRATIC RESTAURANT OF
MASSACHUSETTS, INC.
PLAINTIFF

v.

EDWARD F. HARRINGTON, CHAIRMAN
OF THE ALCOHOLIC BEVERAGES CONTROL
COMMISSION OF THE COMM. OF MASS. ET ALS
DEFENDANTS.

Judgment for Defendant[s] after Rescript
(Pursuant to Mass.R.A.P.28)

This action was appealed to the Supreme Judicial Court; the issues having been duly heard and the Supreme Judicial Court having duly issued a rescript, it is ordered and adjudged:

Complaint of plaintiff is dismissed as to defendants.

Dated at Boston, Massachusetts, this 6th day of April, 1978.

By: JOHN J. LYNCH,
Assistant Clerk.

Appendix B-1.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT.

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC. *vs.*
ALCOHOLIC BEVERAGES CONTROL COMMISSION (No. 1)
(and a companion case[1]).

Suffolk. December 7, 1977. — March 3, 1978.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, WILKINS, & LIACOS, JJ.

Alcoholic Beverages Control Commission. Alcoholic Liquors. Constitutional Law, Freedom of speech, Right to assemble, Alcoholic liquors, Standing to question constitutionality. *Due Process of Law*, Vagueness of statute.

CIVIL ACTIONS commenced in the Superior Court on January 26, 1976, and May 13, 1976.

Motions for summary judgment were heard by *Linscott*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Morris M. Goldings for the plaintiffs.

Thomas Miller, Assistant Attorney General, for the defendant.

WILKINS, J. Each plaintiff sought judicial review under G. L. c. 30A, § 14, of a decision of the Alcoholic Beverages Control Commission (commission) suspending its license to sell alcoholic beverages. In each case, summary judgment was entered in the Superior Court dismissing the complaint. The appeals, which raise identical issues, were consolidated,

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[1]The companion case is United Food Corporation *vs.* Alcoholic Beverages Control Commission.

and we transferred them to this court on our own motion. We affirm the judgments.

Aristocratic Restaurant of Massachusetts, Inc. (Aristocratic), was the holder of a 1975 all alcoholic beverages restaurant license for premises at 240 Boylston and 19 Providence Streets in Boston. One night in October, 1975, two investigators of the commission entered those premises and were seated at the bar. The investigators observed that "after leaving the stage and getting dressed, the dancers mingled with the patrons and had patrons purchase drinks for them." Each of two or three dancers employed by Aristocratic asked one or the other of the investigators to buy her a drink. The investigators subsequently identified themselves to the person in charge of the premises.

About three weeks later, the commission sent Aristocratic notice of a hearing to determine whether Aristocratic "violated certain provisions of the Liquor Control Act." The notice referred to Regulation Thirteenth of the Boston Licensing Board (Regulation 13) and the commission's Regulation 21. Regulation 13 provides that "[e]ntertainment, if any, must be confined to a particular place, and the entertainers must not be allowed to mingle with or circulate among the patrons." The commission's Regulation 21 provides that "[n]o licensee for the sale of alcoholic beverages shall permit any . . . illegality of any kind to take place in or on the licensed premises."[1]

The notice of the hearing did not recite the date of the alleged violation, and the commission did not file any further specifications, although Aristocratic moved for a more definite statement. The commission had a practice of allowing a licensee's representative to read its entire file, and Aristocratic had that opportunity in this proceeding.

[1]For the purposes of these appeals, the only "illegality" claimed by the commission was the violation of Regulation 13.

The commission conducted a hearing on December 16, 1975; rendered a decision that day finding a violation of Regulation 13 and of its Regulation 21; and ordered a suspension of Aristocratic's license for a period of ten days. The commission filed a statement of reasons containing findings of fact.

The circumstances concerning United Food Corporation (United) are much the same as those concerning Aristocratic. On January 4, 1976, investigators of the commission entered United's licensed premises on Washington Street in Boston operated under the name "Two O'Clock Lounge." A female dancer left the stage, dressed, approached the investigators, and asked them if they would like company. They asked what they would have to do for her company, and she replied, "You'll have to buy me a drink for starters." When the investigators declined the offer, she left them and approached other male patrons on the other side of the bar. The investigators identified themselves and informed the person in charge of the premises that a report of the violation of Regulation 13 would be filed with the commission.

On March 23, 1976, the commission sent a notice of a hearing to United, asserting that on January 4, 1976, United violated Regulation 13 and Regulation 21. The commission furnished no further details and, as in the case of Aristocratic, the commission declined, on motion, to make a more definite statement of its charges. But it did advise United that the licensee's complete file was open for inspection. On April 27, 1976, the commission held a hearing and, on that same day, issued a decision suspending United's license for six days for violation of Regulation 13 and Regulation 21. The commission filed a statement of reasons containing specific findings, which have been summarized in part above.

In each case, a Superior Court judge stayed the commission's order of suspension, and, after the commission's motions for summary judgment were granted, the judge allowed each appellant's motion to stay judgment pending appeal.

As we have indicated, the appellants raise identical issues in their appeals. They claim that Regulation 13 and Regulation 21 are "vague, overbroad, and in violation of constitutional rights of speech and association." Their main contentions are that a prohibition of entertainers' mingling with and circulating among patrons is too imprecise to meet constitutional requirements of due process and that, in any event, such a regulation is overbroad because it denies entertainers constitutionally protected rights to speak to and associate with customers. Before reaching these constitutional questions, we shall address procedural objections raised by the appellants.

1. The unsupplemented notices of the hearings were inadequate to provide the licensees with "sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument" (G. L. c. 30A, § 11 [1], inserted by St. 1954, c. 681, § 1), and, therefore, the commission's decisions were "[m]ade upon unlawful procedure" (G. L. c. 30A, § 14 [7] [d], as amended through St. 1973, c. 1114, § 3). However, only where "the substantial rights of any party may have been prejudiced" is a reversal of agency action appropriate. G. L. c. 30A, § 14 (7). Neither appellant has made such a showing here. The files of the commission, including reports of the violations claimed by its investigators, were available to each licensee. Indeed, the record of each proceeding indicates that counsel was adequately prepared to meet the evidence presented

before the commission and that in neither case did he ask for a continuance.[3]

2. There is no merit to the appellant's argument that the commission exceeded its jurisdiction by enforcing a regulation of a local licensing authority. They claim that the commission lacks the power to make an initial interpretation of such a regulation on its own. The appellants concede, however, that the commission has comprehensive powers of suspension over licensees and has statutory authority (G. L. c. 138, § 64) to revoke or suspend a license for violation of a regulation of a local licensing authority. Nothing in the legislative pattern of regulation suggests that the commission may enforce only those local regulations which have been interpreted by a local licensing authority.

3. There was substantial evidence to support the commission's findings of fact. In each case, the evidence showed, and the commission found, that at least one entertainer approached customers on the licensed premises and attempted to have them purchase her drinks. This evidence supported findings that entertainers mingled with or circulated among the patrons. The evidence warranted an inference that the management of the licensed premises "allowed" entertainers to associate with patrons in this manner. Thus, the finding of a violation of Regulation 13, and in turn of Regulation 21, was amply supported by substantial evidence. We consider next the appellants' claim that the suspensions of their licenses cannot stand because Regulation 13 and Regulation 21 are unconstitutional.

4. Regulation 13 and Regulation 21 are not unconstitutionally vague as applied to the appellants in the circumstances revealed by the commission's findings. The appel-

[3] If the commission has not already modified its practice to conform to the requirements of the State Administrative Procedure Act (G. L. c. 30A), it should do so.

lants, therefore, have no standing to challenge these regulations on due process grounds by showing that the regulations may be facially vague, that is, impermissibly vague in other factual circumstances. See *Commonwealth* v. *Gallant*, Mass. , (1977) [Mass. Adv. Sh. (1977) 2254, 2259], and cases cited; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973).[4] The question is whether the licensees had sufficient warning, and the enforcement authorities had sufficient guidance, from Regulation 13 to determine whether the conduct of the licensees' entertainers was forbidden. See *Commonwealth* v. *Bohmer*, Mass. , (1978) [Mass. Adv. Sh. (1978) 316, 319]; *Commonwealth* v. *707 Main Corp.*, Mass. , - (1976) [Mass. Adv. Sh. (1976) 2643, 2653-2654]. We believe that where an entertainer indiscriminately approaches patrons soliciting them to purchase drinks for him or her, the entertainer has "mingle[d] with or circulate[d] among the patrons." These words are not vague in the context of the facts apparent on the record. Even if Regulation 13 were to be considered a criminal statute, and thus held to a higher standard of certainty than a civil sanction (*Winters* v. *New York*, 333 U.S. 507, 515 [1948]), it furnishes a sufficiently definite warning so that people of common intelligence would know that the activities of the appellants' entertainers constituted mingling with and circulating among patrons. See *Commonwealth* v. *Gallant*, *supra* at - [Mass. Adv. Sh. (1977) at 2257-2258]; *Commonwealth* v. *707 Main Corp.*, *supra* at - [Mass. Adv. Sh. (1976) at 2653-2654]. See also *Miami* v. *Kayfetz*, 92 So. 2d 798, 802 (Fla. 1957); *New Orleans* v.

[4] Regulation 21 is involved here, as we have noted, only to the extent that the "illegality" is a violation of Regulation 13. In our opinion in a case with the same name, *post*, (1976) (Mass. Adv. Sh. [1978] 580), released today, we held that "illegality" is not impermissibly vague, if construed to apply only to violations of statutes and regulations.

Kiefer, 246 La. 306, 312 (1964) (holding that the verb "mingle" has a clear connotation to the ordinary mind); *People* v. *King*, 115 Cal. App. 2d Supp. 875, 879 (1952) (same).

5. The appellants argue that Regulation 13 infringes on constitutional rights of free speech and association.[5]

The claim that Regulation 13 violates any right of freedom of speech or assembly under the First Amendment to the Constitution of the United States must fail. The Supreme Court has recognized the right of the States, under the Twenty-first Amendment, to exercise controls on the exercise of First Amendment rights in establishments dispensing liquor in situations where such restraints would be unacceptable elsewhere. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975). See *Commonwealth* v. *Sees*, *ante* , (1978) [Mass. Adv. Sh. (1978) 536, 541]; *California* v. *LaRue*, 409 U.S. 109, 114-116 (1972). If the nude dancing considered in the *LaRue* case could be regulated by the State as part of its control over licensed liquor establishments, we think that Regulation 13's controls over the conduct of entertainers who are not performing do not run afoul of the First Amendment. The appellants' constitutional arguments must rest exclusively on the Constitution of the Commonwealth.

Although the appellants make no specific reference to art. 16 of the Declaration of Rights of the Constitution of the Commonwealth, as amended by art. 77 of the Amendments, which guarantees freedom of speech, we must consider art. 16. The protection of freedom of speech afforded by art. 16 certainly extends to the communication of ideas.

[5] Regulation 13 by its terms forbids only conduct. However, its prohibition does include an element of restraint on speech in that by forbidding mingling and circulating it indirectly prohibits oral communication.

Because our State Constitution has no special provision like the Twenty-first Amendment concerning the regulation of alcoholic beverages, the right of free speech guaranteed by art. 16 has no parallel limited status in premises where alcoholic beverages are served. In *Commonwealth* v. *Sees*, *supra* at [Mass. Adv. Sh. (1978) at 541], released today, we hold that an attempted regulation of nearly nude dancing in a licensed liquor establishment violated art. 16 because the performance was protected expression. However, we find no expressive conduct in the activities engaged in by the entertainers in this case. The entertainers were not acting as entertainers or otherwise engaged in expressive conduct.

A restriction of entertainers' soliciting drinks from customers in liquor establishments serves a significant governmental interest. The random solicitation of drinks often implies the availability of some service, at least the entertainer's company, in return. The entertainer is normally acting with the knowledge and approval of his or her employer. Indeed, in many instances such activity may be a requirement of the job. Although some patrons may be "willing victims" of such activity, others may not be. It would be naive not to recognize that the solicitation of drinks is often a prelude to the solicitation of a customer to engage in sexual activity.[8] Where the speech claimed to be protected is carried on solely for profit, where the information transmitted is inconsequential, and where the government's interest in regulating the activity with which such speech is associated is significant, we believe the prohibition by Regulation 13 of the solicitation of drinks to be appro-

[8] We note, but need not determine on the facts of this case where the actual solicitation of drinks is shown, that a prohibition of entertainers' indiscriminate solicitation of drinks may be enforceable effectively only by prohibiting entertainers from mingling with and circulating among patrons.

priate in time, place, and manner. *Opinion of the Justices*, Mass. , (1977) [Mass. Adv. Sh. (1977) 1831, 1834]. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-771 (1976). See *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 68-69 (1976). Thus, we conclude that art. 16 does not assure a constitutional right, in the name of free speech, to hustle drinks. Certainly, art. 16 does not grant licensees a right to have their entertainers solicit drinks from customers. Therefore, as applied to the facts of these cases, Regulation 13 infringed no art. 16 rights of the appellants or their entertainers.

Although the facts of these cases present no circumstances of speech or expressive conduct protected by art. 16, the appellants assert that Regulation 13 is unconstitutionally vague and overbroad and argue that, in a free speech context, they may rely on hypothetical circumstances to challenge the propriety of the regulation. In particular circumstances, a person may have standing to advance overbreadth arguments, based on hypothetical facts, where First Amendment rights are involved. See *First Nat'l Bank* v. *Attorney Gen.*, Mass. , (1977) [Mass. Adv. Sh. (1977) 134, 151], and *Commonwealth* v. *Dennis*, 368 Mass. 92, 95 (1975) [Mass. Adv. Sh. (1975) 1924, 1927-1928], each citing *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-615 (1973). The appellants have no standing, however, in the context of a vagueness challenge to argue that Regulation 13 is unconstitutional as applied to others. *Commonwealth* v. *Bohmer*, Mass. , n.6 (1978) [Mass. Adv. Sh. (1978) 316, 318 n.6]. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976). *Broadrick* v. *Oklahoma*, *supra* at 608.

This court has never discussed the permissible scope or the availability of overbreadth arguments advanced exclu-

sively under art. 16.[7] We believe that a person may assert the rights of others under art. 16 to challenge the constitutionality of government action in a manner similar to that in which overbreadth arguments have been advanced under the First Amendment. But, to have standing to assert a facial overbreadth argument, a party must demonstrate both that the challenged governmental regulation is not susceptible of a construction which limits its application to unprotected activity and that the deterrent effect of any governmental regulation is both "real and substantial." *Commonwealth* v. *Bohmer, supra* at [Mass. Adv. Sh. (1978) at 322]. *Young* v. *American Mini Theatres, Inc., supra* at 60. *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 216 (1975).

The appellants lack standing to invoke the overbreadth doctrine here. They have not shown that the operation of Regulation 13 imposes a real and substantial deterrent to the exercise of rights protected by art. 16. They offered no evidence to support such a claim, and their briefs do not suggest any hypothetical set of facts which would support a claim of the facial invalidity of that regulation. We decline to pass on the appellants' general assertion of overbreadth, unsupported by specific argument. If and when such argument is made, the government will have the opportunity to contest the overbreadth claim. In doing so, the government may argue that, in the circumstances, Regulation 13 should be construed to be inapplicable to the hypothetical situations posited or that, if Regulation 13 does restrict any art. 16 rights, those restrictions are limited reasonably in

[7]Individual Justices of this court have accepted the availability of an overbreadth argument under art. 16. See Justice Kaplan, dissenting in part, joined by Chief Justice Tauro, in *Revere* v. *Aucella*, 369 Mass. , (1975) (Mass. Adv. Sh. [1975] 3350, 3367); Justice Kaplan and Justice Liacos, concurring, in *Commonwealth* v. *Sees, ante* , (1978) (Mass. Adv. Sh. [1978] 536, 544).

time, place, and manner to serve the State's significant interest in the regulation of conduct. See *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976). See also *Tahiti Bar, Inc. Liquor License Case*, 395 Pa. 355, 372, appeal dismissed sub nom. *Tahiti Bar, Inc.* v. *Pennsylvania Liquor Control Bd.*, 361 U.S. 85 (1959). In addition, speech involved in the circumstances to which Regulation 13 applies often may be solely commercial in purpose, engaged in as part of an entertainer's employment. In such cases, "the notion of 'overbreadth' appears inapposite, so that each litigation will be decided by reference to the particular impact of the given legislation or administrative regulation on the parties, not on a consideration of the range of the restraints that could be threatened under it." *Opinion of the Justices*, Mass. , (1977) [Mass. Adv. Sh. (1977) 1831, 1835]. See *Bates* v. *State Bar of Ariz.*, U.S. , (1977) [97 S. Ct. 2691, 2707 (1977)].

Although the appellants claim that their entertainers have a constitutional right to associate with patrons of their establishments, they offer no reasoning or authority in support of that asserted right nor in support of their standing to advance it. In addition, the appellants assert no constitutional right of their own or of their customers to have their entertainers mingle with customers. Article 19 of the Declaration of Rights of the Constitution of the Commonwealth gives the people the right "in an orderly and peaceable manner, to assemble . . . ." But art. 19 does not extend to the appellants any greater standing in the circumstances than does art. 16.

Judgments affirmed.

LIACOS, J. (dissenting). I respectfully dissent from part 5 of the majority opinion. The plaintiffs adequately have raised the issue of the overbreadth of Regulation 13 and have presented sufficient argument to allow us to reach a determination of that question. I conclude that the regulation imposes a real and substantial deterrent to the exercise of rights protected by arts. 16 and 19 of our Declaration of Rights, and that we cannot ensure the protection of those rights by interpreting the regulation so as to limit its application to unprotected activity. Under this view, the plaintiffs simultaneously satisfy the requirements for establishing standing to assert the overbreadth claim and for succeeding on the merits of that claim.

Regulation 13 provides, in part, that entertainers in establishments subject to the jurisdiction of the Boston Licensing Board "must not be allowed to mingle with or circulate among the patrons." I agree with the court's conclusion that this language is not vague. The defendant commission sets forth in its argument the definition of "mingle": "[t]o associate or unite, . . . to join in company," and the definition of "circulate": "to move, pass, or go around freely from person to person or from place to place." The plaintiffs argue that to "mingle" is to "become closely associated; join or take part with others." While mingling or circulating thus encompasses a wide variety of interpersonal associations implicating such activities as speaking or listening, it cannot be said that a person of common intelligence would be unable to understand the meaning of the regulation. To the contrary, the regulation clearly proscribes any kind of off-stage association or dialogue between an entertainer and a patron. What remains to be determined is whether such a broad regulation impermissibly impairs the exercise of protected rights of speech or association.

As a preliminary matter, the majority opinion briefly inquires into potential sources of rights of an associational or expressive nature. The usual source of such rights, the First Amendment to the United States Constitution, is found to be inapplicable to this case because of the Twenty-first Amendment and the holdings of the Supreme Court in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), and *California* v. *LaRue*, 409 U.S. 109 (1972). I think such a conclusion is premature and, perhaps, unwarranted.[1] The majority opinion goes on to recognize, however, that art. 16 of the Declaration of Rights of the Constitution of the Commonwealth[2] provides an independent source of rights similar in scope to portions of the First Amendment and not affected by a qualifying provision analogous to the Twenty-first Amendment. See *Commonwealth* v. *Sees*, *ante* (1978) [Mass. Adv. Sh. (1978) 536]. Although the plaintiffs in their briefs refer repeatedly to their rights of speech and association under the State as well as Federal Constitution, they make no specific reference to art. 16. I agree with the majority that this oversight should not bar our consideration of the important constitutional issues presented under art. 16, but I should think that the same considerations would

[1] The type of speech or conduct encompassed by the term "mingling" must surely be distinguished from the "bachanalian revelries" subject to regulation in *LaRue*. 409 U.S. at 118. Moreover, the Supreme Court has repeatedly rejected the broad proposition that the First and Fourteenth Amendments are inapplicable to liquor establishments within the umbrella of the Twenty-first Amendment. *Id.* *Doran* v. *Salem Inn, Inc.*, 422 U.S. at 932. See *Opinion of the Justices*, Mass. (1977) (Mass. Adv. Sh. [1977] 1831). The "mingling" issue was not passed on directly by the Supreme Court in either *LaRue* or *Doran*.

[2] "*Article* XVI. The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged." (As amended by art. 77 of the Amendments.)

apply with equal force to art. 19 of the Declaration of Rights of the Constitution of the Commonwealth.[3] The cursory analysis of art. 19 by the majority appears inconsistent with their extended discussion of art. 16. Such disparate treatment seems to me unnecessarily to postpone elucidation of a previously uncharted area that has been put directly in issue in the instant case.

Grounding their analysis solely on art. 16, the majority preliminarily conclude that the activities engaged in by the entertainers in this case did not involve "expressive conduct." The opinion goes on, however, to consider the "significant governmental interest" involved in the suppression of the entertainers' activities, as well as to introduce elements of "time, place, and manner" and "commercial" speech doctrines. Invocation of these analytical tools strongly suggests that certain individual rights of speech and association, other than the right to expressive conduct, have survived the majority's preliminary analysis and are being weighed against the governmental interests. If no such individual rights had survived, the State could impose any rational form of regulation within the bounds of other constitutional prohibitions, and reference to higher standards of State justification or to free speech doctrines would be unnecessary. See, e.g., *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 60-61 (1973). However, the nature of the surviving individual rights is not made explicit in the opinion, thereby confusing rather than clarifying the scope of art. 16.

[3] "Art. XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good: give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

Additionally, countervailing governmental interests identified by the majority are deduced by means of what I view as a questionable exercise of judicial notice. Without basis in the record, the majority find that: (1) the solicitation of drinks implies that the entertainer is making some "service" available, (2) solicitation and the provision of such a service are encouraged or even required by the employer (thereby presumably transforming the activity from private conduct to commercial conduct), and (3) the whole process is a prelude to, or pretense for, solicitation to engage in sexual activity. Moreover, the majority's ultimate conclusion — that there is a significant governmental interest in preventing the solicitation of drinks — appears to be based substantially on the rationale that upholding a blunderbuss attack on constitutionally protected interests will prevent the escalation of such activity to more dangerous or undesirable conduct. I am not willing to embrace the general proposition that the State may anticipate criminal conduct and stop it from developing by imposing restrictions on activities that implicate constitutional rights of free speech or association.

The State arguably can regulate or prohibit the solicitation, or "hustling," of drinks by employees of a licensed establishment; such solicitation may not be the type of speech or association that is protected under art. 16 or art. 19. The State could prohibit solicitation for prostitution, sales above legal maximum prices, misleading and unlawful trade practices (cf. G. L. c. 93A), and a variety of other unlawful acts, all of which is conceded by the plaintiffs. The regulation in question does not, however, provide that "entertainers must not be allowed to solicit drinks from patrons." Regulation 13 provides that "entertainers must not be allowed to mingle with or circulate among the patrons." This fact requires that the plaintiffs' overbreadth

claim be closely examined, and it is on this point that I find myself most seriously in disagreement with the majority.

As a matter preliminary to a discussion of the overbreadth question, it is important to address specifically the intimation in the majority opinion that the regulation is directed to "commercial" speech or conduct. This is clearly not the case, as a few examples will demonstrate. Between performances at the Two O'Clock Lounge, a performer might wish to join a group of friends engaged in a conversation regarding the recent rulings of this court on the subject of nude dancing or mingling. Regulation 13, on its face, prohibits such activity. The same prohibition would apply to Pete Seeger, the late Phil Ochs, or any other entertainer who accepts an engagement at the Two O'Clock Lounge or other establishment under the jurisdiction of the Boston Licensing Board. There is absolutely no basis for assuming that all forms of speech or association undertaken by one who entertains at a licensed establishment are directed at furthering commercial interests, and no such showing has been made in this case. The fact that a discussion takes place in a bar or a restaurant does not automatically transform that discussion into commercial speech.

The plaintiffs clearly and forcefully advance the overbreath argument at several points in their brief and reply brief. They attack Regulation 13 as being overbroad in that it does not "define an offense which the licensees may distinguish from constitutionally protected conduct such as speech and association of their employees with their customers." The majority opinion explicitly recognizes the availability of an overbreadth attack in furtherance of rights protected by art. 16, and indicates that the overbreadth doctrine under art. 16 is "similar" to that developed by the Supreme Court in the First Amendment area. Nevertheless, the majority conclude that these plaintiffs lack standing

to invoke the overbreadth doctrine, and provide three reasons for this conclusion.

The first reason given is that the plaintiffs have not shown that Regulation 13 imposes a "real and substantial" deterrent to the exercise of art. 16 rights. This is, I believe, the most substantial reason, and discussion of it is deferred momentarily. The second reason is that the plaintiffs have offered no evidence to support the overbreadth claim. The theory underlying the First Amendment facial overbreadth doctrine was succinctly stated in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973): "Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a *judicial prediction or assumption that the statute's very existence* may cause others not before the court to refrain from constitutionally protected speech or expression" (emphasis added). Under such a view, it is difficult for me to imagine what kind of "evidence" the majority fault the plaintiffs for not introducing. Surely, the plaintiffs need not "prove" that others not before the court are inhibited from exercising their constitutional rights by the broad language of Regulation 13. What purpose could be served by introducing the testimony of an entertainer that a prohibition on mingling with patrons makes it difficult to associate or speak with the patrons?

The third reason given by the majority is that the plaintiffs have not suggested in their briefs any hypothetical set of facts that would support their overbreadth claim and have not made specific argument on the subject. In my view, the plaintiffs' briefs very adequately suggest the general nature of the problem, and it takes no great leap of imagination to construct hypothetical sets of facts or examples such as I have offered above.

I return now to the first reason stated by the majority for holding that these plaintiffs do not have standing to invoke the overbreadth doctrine — that they have not shown that Regulation 13 imposes a "real and substantial" deterrent to the exercise of rights protected by art. 16. This standard, employed by the majority to reject the plaintiffs' standing, is identical to the standard applicable to a decision on the merits of the overbreadth claim. In other words, had the plaintiffs shown a "real and substantial" deterrence, they would at once have established standing and prevailed on the merits. The "real and substantial" standard was announced by the Supreme Court in *Broadrick*: "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. It is not apparent to me that the *Broadrick* standard is applicable here where the prohibition against mingling "directly" affects rights of "pure" speech and association. (Compare the majority opinion at note 5.) Assuming that it does apply, I think the deterrent effect of Regulation 13 is clearly real and substantial.[4] The terms "mingle" and "circulate" potentially implicate rights of expression and association; Regulation 13 applies to all licensed establishments where entertainment is provided; the regulation is in effect at all times that the establishment is open for business; and the penalties for violating the regulation are severe. The majority provide no analysis to justify a conclusion that the operation of Regulation 13 imposes no real or substantial deterrent to the exercise of art. 16 or art. 19 rights.

[4] *Broadrick* does not define the term "substantial" in the context in which it is used, nor do subsequent Supreme Court cases clarify the situation. The term could have a variety of meanings.

A conclusion that a statute or regulation sweeps within its literal meaning protected expression does not generally require that the statute or regulation be struck down. The preferred course, when possible, is to construe the statute or regulation so as to narrow its impact and avoid interference with protected rights. See *Commonwealth* v. *Bohmer*, Mass. , (1978) [Mass. Adv. Sh. (1978) 316, 322]; *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976). I do not understand the majority opinion as having attempted any such narrowing of the sweep of Regulation 13. Moreover, I doubt whether any narrow construction of the words "mingle" or "circulate" could be judicially provided without involving this court in what would be essentially a legislative task.

I would hold the regulation facially overbroad. Therefore, I dissent.

Appendix B-2.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT.

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC. *vs.* ALCOHOLIC BEVERAGES CONTROL COMMISSION (No. 2).

Suffolk. December 7, 1977. — March 3, 1978.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, WILKINS, & LIACOS, JJ.

Alcoholic Beverages Control Commission. Prostitution, Maintaining premises for. *Due Process of Law,* Vagueness of statute.

CIVIL ACTION commenced in the Superior Court on August 21, 1975.

A motion for summary judgment was heard by *McNaught,* J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Morris M. Goldings for the plaintiff.

Thomas Miller, Assistant Attorney General, for the defendant.

WILKINS, J. The appellant in this case (Aristocratic) is the same entity whose appeal we decided today in *Aristocratic Restaurant of Mass., Inc.* v. *Alcoholic Beverages Control Comm'n (No. 1), ante* (1978) [Mass. Adv. Sh. (1978) 558]. In this appeal, also under G. L. c. 30A, § 14, Aristocratic challenges the commission's twenty-day suspension of its license to sell alcoholic beverages at the same premises involved in Aristocratic's other appeal. The

procedural course of this appeal through the Superior Court to this court is the same as that of the other appeal decided today.

1. The commission suspended Aristocratic's license for five of the twenty days for violation of Regulation Thirteenth of the Boston Licensing Board (Regulation 13). The same arguments are advanced here, as in the previous appeal, concerning (a) the unconstitutionality of Regulation 13, (b) the commission's lack of jurisdiction to enforce Regulation 13, and (c) inadequacy of notice of the charges against Aristocratic. We decided these points adversely to Aristocratic in our other opinion and need not discuss them further here. In addition, the record discloses substantial evidence to support the commission's finding that Aristocratic violated Regulation 13.

2. Fifteen days of the twenty-day suspension were based on the commission's finding that Aristocratic violated the commission's Regulation 21[1] by, in turn, violating G. L. c. 272, § 26. Section 26 of G. L. c. 272, as amended through St. 1962, c. 224, in relevant part, makes it a crime if "any person owning, managing or controlling . . . [a licensed establishment, as defined in G. L. c. 138, § 1] induces or knowingly suffers any person to resort to, or be in such place for the purpose of immoral solicitation or immoral bargaining."

Aristocratic argues that the word "illegality" in Regulation 21 and the words "immoral solicitation or immoral bargaining" in G. L. c. 272, § 26, are unconstitutionally vague. We are confident that a person of ordinary intelligence would have no difficulty in understanding that the

[1] Regulation 21 does not appear in the record appendix in this appeal. From the earlier appeal, we are aware that Regulation 21 forbids a licensee to permit any "illegality of any kind to take place in or on the licensed premises."

word "illegality" in Regulation 21 means any violation of any statute or regulation having the force of law.

Before further discussion of Aristocratic's claim that fifteen days of its suspension must be set aside, we shall set forth the facts found by the commission concerning the alleged violation of G. L. c. 272, § 26. These facts appear in a statement of reasons filed by the commission on July 24, 1975, the day of the hearing, and they support the commission's finding that Aristocratic violated commission Regulation 21 and G. L. c. 272, § 26.

On the night of April 15, 1975, investigators of the commission entered the licensed premises. A female dancer approached them and asked for a drink which they ordered and paid for at the bar. The dancer then took the left hand of one of the investigators and place it between her thighs. She then placed her hand "on one of the investigators crotch and rubbed his private parts." As they continued drinking, she moved his hand between her legs. She then said, "If you want a real good time, buy me a bottle of champagne," and stated that, if he purchased a bottle of champagne for $18, "we can go down back in a booth." The dancer and the investigator went to a back booth where, after he paid for the champagne, she again placed his hand between her thighs and her hand on his groin. Shortly, she excused herself and went on the stage to dance. Later, she returned to the booth, finished the champagne, and asked the investigator to purchase another bottle. He said he had no more money, and she immediately left the booth. Although the commission did not so find, the evidence indicated that everything which occurred was in full view of other customers on the premises.[2]

[2] The commission may have made an indirect finding to this effect by dismissing a charge of inadequate lighting on the premises.

For the reasons stated in *Aristocratic Restaurant of Mass., Inc.* v. *Alcoholic Beverages Control Comm'n (No. 1)*, *supra* at - [Mass. Adv. Sh. (1978) at 568-569], Aristocratic has no standing to argue either that G. L. c. 272, § 26, is vague as applied to others or that it is overbroad because it infringes First Amendment rights. Also, for the reasons expressed in that opinion, Aristocratic has no standing to argue that § 26 infringes improperly on any rights of free speech protected by art. 16 of the Declaration of Rights of the Constitution of the Commonwealth, as amended by art. 77 of the Amendments. *Id.*

We, therefore, test Aristocratic's argument that § 26 denies it due process of law, because of its unconstitutional vagueness, by determining whether Aristocratic and the enforcing authorities had adequate guidance that the dancer's conduct was in violation of the statute. *Id.* at - [Mass. Adv. Sh. (1978) at 563-564]. *Commonwealth* v. *Jarrett*, 359 Mass. 491, 496-497 (1971). In its reply brief, Aristocratic acknowledges that the Commonwealth properly could regulate various activities on licensed premises, such as the solicitation for prostitution and other "illegal sexual intercourse, including manual masturbatory acts." The only question here is whether Aristocratic had fair warning that it was illegal knowingly to permit ("suffer") its employee to act as she did.[3]

The authorities on which Aristocratic relies in arguing that § 26 is unconstitutionally vague are not supportive of its claim. In *Revere* v. *Aucella*, 369 Mass. , - (1975) [Mass. Adv. Sh. (1975) 3350, 3354-3355], we struck down a criminal statute on vagueness and overbreadth grounds, but there, unlike this case, constitutional rights of free speech were involved. In 1974, we declined to reconstrue partic-

[3] Aristocratic makes no claim that it did not know what its entertainer was undertaking and did.

ular statutory language to conform to the Supreme Court's then new views on obscenity expressed in *Miller* v. *California*, 413 U.S. 15 (1973). See *Commonwealth* v. *Horton*, 365 Mass. 164 (1974); *Commonwealth* v. *Capri Enterprises, Inc.*, 365 Mass. 179 (1974). Although First Amendment rights were involved in those cases, we recognized that, even so, we had the authority constitutionally to adopt a limited and saving construction of our obscenity statutes in order to avoid problems of overbreadth. *Commonwealth* v. *Horton*, *supra* at 167-168. In the *Horton* case, however, we made it clear that, as a matter of judicial choice, we would not save our obscenity statutes, which in effect had at their foundations nothing more permanent or precise than the shifting views of a majority of the Justices of the United States Supreme Court. *Id.* at 169 n.9, 171. No such ambiguity or uncertainty as once characterized our obscenity statutes exists in the case before us. As a general practice, we have favored saving constructions of statutes, ones which interpret statutes to avoid uncertainty as to their meaning. See *Commonwealth* v. *Balthazar*, 366 Mass. 298, 301-302 (1974).

The words "immoral solicitation or immoral bargaining," although the product of a 1915 statute (St. 1915, c. 180, § 3), have the imprecision of a Victorian euphemism. The full range of these words is unclear; more informative language advantageously could be substituted for them. But a statute is not unconstitutionally vague simply because it might have been more precise. *Rose* v. *Locke*, 423 U.S. 48, 49 (1975). The quoted language of § 26 plainly embraces conduct such as that involved in this case. Only a person who consciously endeavored to ignore the central meaning of those words would be able to say he did not know, and could not have known, that an offer of sexual favors in exchange for the purchase of alcoholic beverages was "immoral solicitation or immoral bargaining." See *Common-*

wealth v. *Gallant*, Mass. , - (1977) [Mass. Adv. Sh. (1977) 2254, 2270-2271]. By her solicitation and conduct in a public place, Aristocratic's entertainer engaged in acts of prostitution. See *Commonwealth* v. *King*, Mass. , - (1977) [Mass. Adv. Sh. (1977) 2636, 2643-2644].

For the reasons stated earlier, we decline to invalidate G. L. c. 272, § 26, on its face. Without undertaking to define its permissible limits, we conclude that § 26 fairly applied to the conduct of Aristocratic's employee in this case.

Judgment affirmed.

LIACOS, J. (concurring in part and dissenting in part). I concur in the majority's position sustaining the validity of G. L. c. 272, § 26, and the commission's Regulation 21. Thus, I join in their decision upholding the fifteen-day suspension. I dissent from their holding on the five-day suspension based on a violation of the commission's Regulation 13 for the reasons stated in my dissenting opinion in *Aristocratic* (*No. 1*), *supra* at [Mass. Adv. Sh. (1978) at 571]. I add only that it seems to me that the majority's views here expressed are further confirmation that neither the State nor its agencies need trench on constitutional rights to effectuate valid State policies. The law is sufficiently flexible to be tailored to meet a validly perceived social need or to prohibit illegal conduct without unnecessarily infringing on constitutionally protected rights.

Appendix C-1.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
No. 11792

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC.

v.

EDWARD F. HARRINGTON,
Chairman of the Alcoholic Beverages Control Commission of the Commonwealth of Massachusetts, et al (No. 1)

Notice of Appeal to the Supreme Court of the United States.

The plaintiff, Aristocratic Restaurant of Massachusetts Inc. hereby files notice that it appeals the judgment of the Superior Court dismissing the Complaint to the United States Supreme Court. The judgment of the Superior Court After Rescript was entered April 6, 1978 and the rescript and opinion of the Supreme Judicial Court was entered March 3, 1978, affirming a judgment of the Superior Court originally entered May 2, 1977. This appeal is taken under the provisions of 28 U.S.C. §1257(2).

By its Attorney,

MORRIS M. GOLDINGS

[Certificate of Service omitted in printing.]

Appendix C-2.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
No. 8913

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC.

v.

EDWARD F. HARRINGTON,
Chairman of the Alcoholic Beverages Control Commission of the Commonwealth of Massachusetts, et al (No. 2)

Notice of Appeal to the Supreme Court of the United States.

The plaintiff, Aristocratic Restaurant of Massachusetts, Inc. hereby files notice that it appeals the judgment of the Superior Court dismissing the Complaint to the United States Supreme Court. The judgment of the Superior Court After Rescript was entered April 6, 1978 and the rescript and opinion of the Supreme Judicial Court was entered March 3, 1978, affirming a judgment of the Superior Court originally entered May 2, 1977. This appeal is taken under the provisions of 28 U.S.C. §1257(2).

By its Attorney,

MORRIS M. GOLDINGS

[Certificate of Service omitted in printing.]

Appendix C-3.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT.

FOR THE COMMONWEALTH

SUFFOLK, ss: SITTING, 1978

No. 1121

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC.

v.

EDWARD F. HARRINGTON,
Chairman of the Alcoholic Beverages Control Commission of the Commonwealth of Massachusetts,
et al (No. 1)

Notice of Appeal to the Supreme Court of the United States.

The plaintiff, Aristocratic Restaurant of Massachusetts, Inc. hereby files notice that it appeals the judgment of the Superior Court dismissing the Complaint to the United States Supreme Court. The judgment of the Superior Court After Rescript was entered April 6, 1978 and the rescript and opinion of the Supreme Judicial Court was entered March 3, 1978, affirming a judgment of the Superior Court

originally entered May 2, 1977. This appeal is taken under the provisions of 28 U.S.C. §1257(2).

By its Attorney,

MORRIS M. GOLDINGS

[Certificate of Service omitted in printing.]

Appendix C-4.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT.

FOR THE COMMONWEALTH.

SUFFOLK, ss: SITTING, 1978

No. 1120

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC.

v.

EDWARD F. HARRINGTON, Chairman of the Alcoholic Beverages Control Commission of the Commonwealth of Massachusetts, et al (No. 2)

Notice of Appeal to the Supreme Court of the United States.

The plaintiff, Aristocratic Restaurant of Massachusetts, Inc. hereby files notice that it appeals the judgment of the Superior Court dismissing the Complaint to the United States Supreme Court. The judgment of the Superior Court After Rescript was entered April 6, 1978 and the rescript and opinion of the Supreme Judicial Court was entered March 3, 1978, affirming a judgment of the Superior Court originally entered May 2, 1977. This appeal is taken under the provisions of 28 U.S.C. §1257(2).

By its Attorney,

MORRIS M. GOLDINGS

[Certificate of Service omitted in printing.]